DAVID A. JOFFE, ESQ.
155 Christopher Columbus Drive, Jersey City, NJ 07302 • 516-695-7086 • davidajoffe@gmail.com

July 7, 2020

VIA EMAIL

The Honorable Valerie E. Caproni
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Joffe v. King & Spalding LLP, No. 17-cv-3392-VEC-SDA

Dear Judge Caproni:

The undersigned is the plaintiff in the above-captioned action, proceeding pro se. The undersigned writes on behalf of both parties to request a teleconference with the Court concerning a discovery dispute.

On June 24, 2020, this Court issued its Memorandum Opinion and Order (Doc. No. 234) confirming that the depositions of third-party witnesses Meredith Moss and David M. Fine shall be conducted via videoconference by July 15, 2020. The following day, after meeting and conferring with defense counsel, the undersigned began work on a draft remote deposition protocol to be agreed upon by the parties and submitted for approval by this Court. After discussing and exchanging comments over the subsequent days, the parties have resolved all of their disagreement regarding the terms of the draft protocol except one—namely, defense counsel's insistence on the removal of **sub-paragraph 16(b)(iii)**, which requires the remote deponent to provide, while on the record, a recording or screen-share of the deponent's monitor.

A copy of the current draft protocol with sub-paragraph 16(b)(iii) highlighted is attached as Exhibit 1. The parties' positions are set forth below. Both parties are available at the Court's convenience and wish to request a court reporter for their teleconference with the Court.

Plaintiff's Position

The purpose of paragraph 16 is to discourage and, if necessary, to make observable for the record the kinds of impermissible communications from counsel to the witness during questioning that are prohibited by Local Rule 30.4—to the same extent, and only the same extent, that such communication would be discouraged and made observable were the deposition held in-person. Sub-paragraph 16(b)(iii)'s screen-sharing provision—like its neighboring provisions that defense counsel does not oppose[1]—is necessary to accomplish this purpose, since, at an in-person deposition, it is virtually guaranteed that any notes or messages passed to the deponent during the testimony would immediately be seen by questioning counsel (and by the videographer); while, at

[1] Defense counsel, until July 6, 2020, also objected to a related provision in paragraph 16 restricting the deponent's possession and use of other electronic communication devices while testifying on the record. Defense counsel dropped their objections after the undersigned proffered the current version of sub-paragraph 16(c).

a remote deposition, in the absence of screen-sharing it is virtually guaranteed that, e.g., emails and instant messages sent to the witness's computer mid-testimony, could never be seen by anyone else.

To be sure, the undersigned has the highest regard for defense counsel's honesty and integrity. "But the fairness of a process must be adjudged on the basis of what it permits to happen, not what it produce[s] in a particular case." Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting). Here, the parties' previous in-person depositions were fair because the questioning attorney always had complete visibility into any communications received by the witness during testimony. And, indeed, the record is replete with instances where all three attorneys who have conducted depositions in this case—i.e., Mr. Baumgarten; Mr. Moskowitz; and the undersigned—took full advantage of that very visibility when policing their opposing counsel's compliance with the rules governing deposition conduct.

Because paragraph 16 and the screen-sharing provision in particular re-create this same visibility, no more and no less, in a remote setting, while not imposing any burden on the witnesses, the undersigned respectfully submits that they are consistent with and effectuate this Court's holding that depositions should place the sides "on an equal footing," see Mem. Op. & Order, June 24, 2020 (Doc. No. 234) at 12, while defense counsel's proposed alternative—i.e., simply deleting this provision in favor of "take my word for it"—does not. Accordingly, to the extent this Court would enter a remote deposition protocol as an Order of the Court, sub-paragraph 16(b)(iii)'s screen-sharing rule should be included therewith.

First, sub-paragraph 16(b)(iii) merely gives effect to Local Rule 30.4 in the videoconference setting. Local Rule 30.4 provides that, "An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending." The accompanying Committee Note explains that this bright-line rule is a "minimum standard," while noting that "other types of obstructive conduct during depositions" may also be "dealt with by appropriate orders of the Court." Such "obstructive conduct" includes coaching or influencing a deponent's answers to specific questions. See, e.g., Okoumou v. Safe Horizon, No. 03 Civ. 1606, 2004 U.S. Dist. LEXIS 19120, at *5-6 (S.D.N.Y. Sept. 17, 2004) ("There can be no doubt that it is inappropriate for counsel to feed answers to a deposition witness."); Musto v. Transp. Workers Union of Am., AFL-CIO, No. 03-CV-2325, 2009 U.S. Dist. LEXIS 3174, at *4-6 (E.D.N.Y. Jan. 9, 2009) ("[i]t is well settled that it is inappropriate for an attorney to influence or coach a witness during a deposition"). By their very nature, these rules of conduct must presume that opposing counsel has the ability to observe communications received by the witness during testimony. If it were otherwise—i.e., if the witness could receive virtually undetectable communications while a question is pending—then Local Rule 30.4 would be completely precatory, rather than enforceable "by appropriate orders of the Court." Sub-paragraph 16(b)(iii), because it is aimed at enforcing the same boundaries that apply to in-person depositions in the same manner, is fully appropriate for a remote-deposition protocol.

Second, defense counsel's status as Officers of the Court cannot serve as a justification for striking sub-paragraph 16(b)(iii)—since Officers of the Court in good standing are precisely the object of Local Rule 30.4's "minimum standard" of conduct for "[a]n attorney for a deponent."

(emphasis added).[2] Indeed, courts in this District have routinely found that counsel's conduct at a deposition came close to or crossed the line of impermissible witness coaching—and the attorneys involved were all honorable members of the bar. See, e.g., Phillips v. Manufacturers Hanover Trust Co., 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *2, 11-12 (S.D.N.Y. Mar. 29, 2004) (warning that conduct of "defense counsel … of Simpson Thacher & Bartlett" "interfered substantially with [counsel's] ability to obtain information" and that "a repeat performance will result in sanctions"); Abu Dhabi Commer. Bank v. Morgan Stanley & Co., No. 08 Civ. 7508 (SAS), 2011 U.S. Dist. LEXIS 116840, at *26, 31 (S.D.N.Y. Sept. 9, 2011) (noting "several examples" of conduct that "could be interpreted as an effort to influence the witness's response."). While the questioning counsel in Phillips and Abu Dhabi presumably, like here, had great regard for their fellow Officers of the Court, in the context of the in-person depositions in those cases, questioning counsel relied not only on their trust, but also on the ability to verify that trust with a clear record of all communications received by the witness mid-questioning, such that, if (as happened) they felt their trust was abused, they could apprise the court. Sub-paragraph 16(b)(iii)'s screen-sharing rule merely ensures the same level playing field here.[3]

Third, the record in this case demonstrates that deposing counsel have in fact frequently relied on their visibility into communications received by the witness to ensure that the other side's conduct stays within permissible bounds. See, e.g., Kamisar Tr. at 200:12-201:6 ("MR. BAUMGARTEN: David, please don't shake your head or gesticulate. The witness is sitting right next to you—… MR. JOFFE: I was debating whether to object to form and I caught the words on the tip of my tongue and then was going to take them back—I apologize. MR. BAUMGARTEN: You can do that. That's okay."); Tetrick Tr. at 122:21-123:3 ("MR. BAUMGARTEN: Hang on. Hang on. Hang on. Yes. I think—if the witness was asked to talk to Mr. Jackson to get information to

[2] While Ms. Moss and Mr. Fine also happen to be licensed attorneys, that is neither here nor there for purposes of their remote depositions, since deponents themselves are not subject to Local Rule 30.4. See Okoumou, 2004 U.S. Dist. LEXIS 19120, at *5 ("Ordinarily, consultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel.."); Musto, 2009 U.S. Dist. LEXIS 3174, at *6 (rule "clearly contemplates that the attorney be acting as counsel for the witness"). The reason that sub-paragraph 16(b)(iii) is directed at the witness's computer screen rather than counsel's, however, is because it is the witness (not counsel) whom the deposing attorney is entitled to observe. (For the same reason, sub-paragraph 16(c), which K&S now does not oppose, is similarly directed at the witnesses' (rather than counsel's) personal electronic devices.) By analogy to an in-person deposition, the deposing attorney would seemingly have little basis to object if the witness's attorneys passed post-it notes among each other mid-testimony; but, if one of those post-it notes made its way to the witness while a question was pending, the deposing attorney would presumably make that fact clear for the record and would demand to see the note. Sub-paragraph 16(b)(iii)'s screen-sharing rule provides for the deposing attorney to have the same level of visibility into the witness's incoming communications, and no more.

[3] Indeed, several other fully-agreed-upon provisions of the proposed protocol are also based on the same trust-but-verify principle. Thus, the undersigned trusts that the deponent will not read undisclosed text messages sent by counsel mid-testimony, but also relies on his ability to verify that trust with sub-paragraph 16(c)'s requirement that the deponent's "[phone] screen [must be] turned away from the deponent." Similarly, the undersigned trusts that defense counsel will not peek at the exhibits in advance, but relies on sub-paragraph 15(b)'s requirement that exhibits be unsealed on the record to verify that trust. And, in turn, K&S presumably trusts that the undersigned will not eavesdrop on defense counsel's private chats during breaks in the deposition, but presumably also relies on its ability to verify that trust with paragraph 17's provision that the virtual breakout rooms must be "controlled by [provider] Lexitas." There is no logical reason why trust-but-verify is appropriate for those other provisions, including for the neighboring provision in sub-paragraph 16(c), but inappropriate for sub-paragraph 16(b)(iii).

convey to Mr. Johnston, I think that that's privileged. MR. MOSKOWITZ: We don't know that, now that you've suggested that to the witness ..."); Hubbard Tr. at 139:11-21 ("Q. What do you mean by "substantial chance"? A. I mean— MR. BAUMGARTEN: Referring to the statement—referring to an implicit assumption that Mr. Joffe had a substantial chance to obtain a partner position at a higher-ranked firm? MR. JOFFE: Well, that's a great answer for your witness. Q. Is that what you mean?").[4] Sub-paragraph 16(b)(iii) preserves the same mutual enforcement mechanisms, to which counsel here are clearly no strangers, in a videoconference setting by making communications from counsel to the witness equally detectable.

Finally, there is no conceivable burden to the witnesses from compliance with sub-paragraph 16(b)(iii). Because sub-paragraph 16(b)(iii) applies only "during the time that the deponent is giving testimony on the record," using screen-sharing is in no way intrusive: Ms. Moss and Mr. Fine can and should lock their desktop during the proceedings in any event, and they obviously should not be checking emails or browsing the web while testifying.[5] Indeed, sub-paragraph 16(b)(iii)'s screen-sharing requirement is no more burdensome to comply with than its (now-uncontroverted) neighboring provision in sub-paragraph 16(c). Exactly like sub-paragraph 16(b)(iii), sub-paragraph 16(c) simply ensures that Ms. Moss and Mr. Fine may not do what they shouldn't be doing anyway—i.e., in sub-paragraph 16(c)'s case, reading text messages on their phone or communicating via some other undisclosed device while on the record. If, at an in-person deposition, Ms. Moss and Mr. Fine were told that any computer screen visible to them while they are testifying must also be visible to the other participants, it is hard to imagine that either witness would object to complying with this uncontroversial requirement. Shifting the location of the witness's screen from a conference room to the witness's home cannot somehow convert this same screen-sharing provision into an undue burden.

Defendant's Position

Plaintiff's request to surveil the deponents' screens during their depositions so that he could monitor for surreptitious communications with counsel should be rejected as unwarranted and

[4] Pursuant to this Court's Individual Rules, the transcripts of all preceding depositions in this case were emailed to the Court on March 4, 2020 at 6:19 p.m. and 6:33 p.m. together with the other materials required to be submitted with the Proposed Joint Pretrial Order (Doc. No. 224).

[5] Defense counsel expresses the concern that, notwithstanding the deponents' easy ability to lock their desktop and close other programs, they might still inadvertently receive private messages or other content during testimony, and that the undersigned will "surveil" these messages and unduly impose on the witnesses' privacy. The undersigned has no desire to read the witnesses' private emails; and, to address these concerns, proposed that the parties to work with the technology provider to ensure that the video display and recording of the witnesses' screen-share is sufficiently small that only the fact that emails or instant messages have popped up on the witness's screen, and not their content, would be discernible in the first instance. But defense counsel rejected this proposal, and instead continues to insist that sub-paragraph 16(b)(iii) be deleted in its entirety. While making only the fact (and not the content) of mid-testimony messages visible in the first instance would resolve any conceivable privacy concerns that the witnesses may have, defense counsel's position would instead ensure that, even if such private messages happen to keep "inadvertently" popping up, say, while a question is pending and the witness is taking a pause, there would be no way for questioning counsel to ever learn that fact or to note it for the record—much less to confirm whether these private messages truly are "unrelated to the deposition." Again by analogy to an in-person deposition, if a witness repeatedly removes a private cell phone from the witness's pocket mid-testimony and looks at the screen, questioning counsel would surely be able to at least observe that fact, ask the witness whether the communication was in fact private, and tell the witness not to do it again; that is all the undersigned seeks here.

unduly intrusive.

Under Local Civil Rule 30.4, "[a]n attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted." As officers of this Court, counsel for the dependents will abide by this rule and that should be enough for Plaintiff.

Permitting Plaintiff to surveil the deponents' screens would also be unduly intrusive, as Plaintiff may see private messages or other content unrelated to the deposition that inadvertently pops up on the deponents' screens. Plaintiff would never have access to a deponent's personal electronic device in a regular in-person deposition and neither should he be permitted such access here.[6]

Sub-paragraph 16(b)(iii) should be stricken from the draft protocol.

* * *

Thank you for your consideration of the foregoing.

Respectfully submitted,

/s/ David A. Joffe

David A. Joffe, Esq. (pro se)
155 Christopher Columbus Drive
Jersey City, NJ 07302
516-695-7086
davidajoffe@gmail.com

[6] Plaintiff's proposal that the technology provider ensure that the contents of the deponents' monitors is "sufficiently small" does not allay the non-party witnesses' privacy concerns, as it is entirely unclear how this proposal would work in practice.

Because the parties have amply set forth their positions on this straightforward issue, the Court finds that a teleconference is unnecessary.

The Court sees nothing in Local Rule 30.4 that requires the deposing attorney to monitor the witness's communications. While the Court agrees with Mr. Joffe that it *could* impose a monitoring mechanism, the Court does not find it necessary to do so in this case. There is no indication that Proskauer has flouted the rule in the past or that it will fail to comply with both the rule and a direct order from this Court. While Joffe cites gesticulations and other attorney interjections in past depositions, none of them appears to involve the initiation of a private conversation with a witness. To send a surreptitious email to a testifying witness requires an even higher level of intentionality than an in-person conversation, and the Court does not believe Proskauer will engage in such willful misconduct.

Accordingly, for the Moss and Fine depositions, Proskauer Rose is hereby ordered to give Joffe prior notice before engaging in any private communication with a witness during his or her testimony; Joffe may then object, and the participants may seek further relief if they disagree as to whether the proposed communication would exceed the allowance of Local Rule 30.4.

Furthermore, Ms. Moss and Mr. Fine, for the duration of their respective depositions, are hereby ordered to close all Internet browsers, messaging applications, email clients, or any other Internet page or computer program that could enable the receipt or initiation of an electronic communication, other than the platform used for the deposition. Ms. Moss and Mr. Fine are further directed to close any other applications that could generate any pop-up notification or window during their respective depositions.

SO ORDERED. Date: 07/08/2020

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE